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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Review of the Commission's)
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

MM Docket No. 92-51 ✓

**COMMENTS OF MEDIA ACCESS PROJECT,
TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND
WASHINGTON AREA CITIZENS' COALITION INTERESTED IN
VIEWERS' CONSTITUTIONAL RIGHTS**

Media Access Project, Telecommunications Research and Action Center and Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (collectively "MAP et al.") respectfully respond herein to the Commission's Notice of Proposed Rule Making and Notice of Inquiry (FCC No.92-96, released April 1, 1992) ("NOPR") in the above matter.

INTRODUCTION

These comments are limited to the issue of whether the Commission should permit third party creditors to obtain security interests in broadcast licenses. MAP et al. urge the Commission to resist any temptation to sacrifice principles for short-term economic goals and to uphold its longstanding policy against treating licenses as personal property. The Commission has other means of addressing the radio industry's capital investment problem¹; and the Commission should consider them before creating a

¹Further, MAP, et al., question whether the Commission has an overly pessimistic view of the industry's capital problem, particularly in light of a new Tax Court decision permitting broadcasters to amortize their licenses, raising their value as much as 10 percent. Jefferson-Pilot Corporation and Subsidiaries v. Commissioner of Internal Revenue, 98 T.C. No. 32 (filed April

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security interest in a broadcast license.

Permitting third party creditors to obtain security interests in broadcast licenses clearly violates the well-established principle that a license is not a piece of property subject to private ownership. Both the plain statutory language of the Communications Act and longstanding Commission policy based thereupon, as enunciated in Jefferson Radio Company v. FCC, 340 F.2d 781 (D.C. Cir. 1964), establish that FCC licenses confer no ownership rights on a licensee and are not subject to sale or transfer.

Allowing security interests in licenses would undermine the Commission's regulatory function and drain its resources. The deterrent force behind the Communications Act will be diminished since broadcasters would know they could violate the law and then escape all or most of the responsibility for their misdeeds by abandoning the station. At the same time, creditors will have an incentive to interfere in the regulatory process to protect their new security interests in a station license. This flood of new stakeholders in the licensing process could strain Commission resources and is likely to result in less rigorous enforcement of the Communications Act.

13, 1992). Ironically, the same policy motivating that decision justifies MAP's position here. Licenses are not permanent property of the licensee; they expire within a fixed term.

I. ALLOWING CREDITORS TO OBTAIN SECURITY INTERESTS IN BROADCAST LICENSES CONTRADICTS THE WELL ESTABLISHED PRINCIPLE THAT A BROADCAST LICENSE IS A PUBLIC TRUST NOT SUBJECT TO PRIVATE OWNERSHIP.

The plain language of the Communications Act clearly establishes the principle that a broadcast license conveys absolutely no property interests onto a licensee. Section 301 of the Communications Act provides the Commission with the authority to license for the use of radio channels, "but not the use thereof." 47 U.S.C. §301. Section 304 requires licensees to waive any claim to ownership of any part of the electromagnetic spectrum before they may receive a license. 47 U.S.C. §304.

The courts have repeatedly affirmed the plain language of the Communications Act to say the airwaves are the public's domain and a broadcast license represents nothing more than "a public trust subject to termination for breach of duty." Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

The Commission itself has explicitly said that "[c]redit cannot be extended in reliance upon the license as an asset from which the licensee's obligations may be satisfied...." Twelve Seventy, Inc., 1 FCC2d 965, 967 (1965). See also, Perfection of Music, Inc., et al., 46 FCC2d 635, 636 (1974) (denying stockholder in radio station any rights to the station license and declaring that "the license is not an owned asset or vested property right.")

To allow third parties to attach security interests to broadcast licenses would be clearly antithetical to the estab-

lished understanding of the license as a trusteeship. A security interest in a license contradicts the very nature of the license by its attempt to attach an ownership interest onto something which itself conveys no ownership rights.

II. ALLOWING CREDITORS TO OBTAIN SECURITY INTERESTS IN BROADCAST LICENSES CONTRADICTS THE JEFFERSON RADIO DOCTRINE.

Allowing security interests in broadcast licenses would undermine the fundamental safeguards and principles embodied in the Jefferson Radio Doctrine. Especially considering the allegiance the Commission has consistently shown to the principles underlying the doctrine, the Commission should continue to bar security interests in broadcast licenses.

A. Creditors Holding Security Interests in Licenses Would Bypass the Jefferson Radio Safeguards.

Granting security interests in licenses contradicts Jefferson Radio and its affirmation of the Commission policy "that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization." Jefferson Radio, 340 F.2d at 783.

The key to the Jefferson Radio Doctrine is that broadcasters whose licenses are up for renewal, subject to revocation, or generally under a cloud, may not assign their licenses until the Commission determines that they have a right to continue to hold those licenses. The doctrine thus bars a broadcaster from the unjust enrichment it would receive by transferring a license, obtained for free, at full value if it were about to lose the license.

However, under a policy in which third parties could attach security interests to licenses, creditors would have a secured guarantee on the license should the borrowing licensee default. Under this scheme, creditors could claim a right to licenses from operators which would have otherwise lost their authorization from the Commission. Thus, this system would allow lenders to bypass the safeguards established in Jefferson Radio. The system would also reduce the number of licenses available for reallocation to the public.

B. Allowing Security Interests in Licenses is Inconsistent With the Commission's Treatment of Jefferson Radio.

Since Jefferson Radio, the Commission has allowed for a small number of narrow exceptions to the general prohibition on the transfer of licenses.² The Commission created these exceptions to deal with extraordinary situations in which a departure from the general Jefferson Radio principles was necessary to serve other purposes behind the Communications Act such as encouraging minority ownership of broadcast facilities. In Cathryn C. Murphy, supra, the Commission allowed an exception for a chronic alcoholic who had suffered serious physical and mental disabilities (including possible brain damage). In doing so, the Commission emphasized the extreme circumstances of the case and

²For example, the Commission has cautiously departed from Jefferson Radio in allowing assignments by a licensee who is seriously ill or incapacitated, Cathryn C. Murphy, 42 FCC 2d 346 (1973), in bankruptcy, Second Thursday Corp., 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970), or in the midst of a distress sale proceeding, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978); see also, Metro Broadcasting, Inc. v. FCC, 110 S.Ct 2997 (1990).

explicitly cited and affirmed Jefferson Radio saying:

We wish to stress the extraordinary nature of the action we take today. Our policy has been and will continue to be to refuse to consider assignment applications where a character qualifications issue has been resolved against the assignor, or where such an issue is still pending. . . . We shall grant the instant renewal application conditionally only because of the unusual nature of Mrs. Murphy's illness and because it is apparent that neither the wrongdoer nor the Conservatrix will profit from our action.

Cathryn C. Murphy, supra, 42 FCC2d at 348.³

Allowing security interests would establish a fatal loophole in the scheme set up under Jefferson Radio. In fashioning the exceptions to Jefferson Radio, the Commission has been careful to preserve the doctrine and should now, consistent with this history, reject security interests in licenses.

Significantly, the presence of a security interest would also spell the end of any effective rule of the FCC's minority distress sale policy since security holders would not allow such transactions to take place.

III. THE PRACTICAL EFFECT OF ALLOWING SECURITY INTERESTS IN BROADCAST LICENSES WOULD BE TO UNDERMINE, COMPLICATE AND INTERFERE WITH THE COMMISSION'S REGULATORY FUNCTION.

The practical effect of allowing security interests in licenses would be the draining of Commission resources through

³In Second Thursday, a broadcaster charged with misconduct was allowed to sell its station without having to undergo a license renewal hearing. In that case, the Commission found that unusual circumstances (neither the broadcaster nor its stockholders were to receive any of the proceeds from the sale) and public interest considerations ("substantial equities in favor of innocent creditors and the public interest in the resumption of service on WWGM") required an exception to the Jefferson Radio Doctrine. Second Thursday, 25 FCC2d 112, 115.

frivolous and costly litigation over license applications. Because a security interest in a license remains valuable only as long as that license is valid, creditors will go to extreme lengths to keep licenses in debtors' hands. To maximize the value of their interests, creditors will encourage borrowers, through financial and legal support, either to litigate to keep their licenses or to abandon them in a manner which results in the license going not to a new licensee selected under the Commission's public interest criteria, but chosen to advance the economic interests of the secured party.

The implication for broadcasters would be a loss of independence and control over their licenses. Permitting security interests in licenses would create a new class of unregulated stakeholders in the broadcast licensing process. This scheme would encourage creditors to interfere in the licensing process, adding to the burden on Commission resources. More importantly, this interference would be motivated by creditors' pure economic interests rather than legitimate public interest concerns.

The overall result is impairment of the Commission's regulatory function because of the drain on resources due to the new load of renewal applications, the increasing chance of error in the licensing process, and the addition of a new group of economic stakeholders into the licensing process. The shift in Commission resources because of this artificial rise in applications will also strain enforcement and regulatory efforts in other areas. The effect on the Commission will be immediate since, in

the initial rush to take advantage of the new credit option, a great number of operators unfamiliar with and unprepared for the market will offer their licensees as security interests to lenders. When the licensees are unable to meet their obligations and face the risk of default, their creditors will be on hand to claim the licenses and fight the Commission for their renewal.

IV. IF THE COMMISSION ALLOWS SECURITY INTERESTS IN BROADCAST LICENSES DESPITE THE ARGUMENTS PRESENTED ABOVE, THE COMMISSION MUST ALSO EXPLICITLY AFFIRM THE JEFFERSON RADIO DOCTRINE.

If the Commission were to decide to reverse longstanding principles and allow security interests in broadcast licenses, despite all of the arguments presented above, it is imperative that the Commission nonetheless affirm what would remain of the Jefferson Radio Doctrine. While we strongly oppose creating any new exceptions, the Commission must in any event, make it clear that it does not intend to wipe away the fundamental principles and safeguards which motivate the Doctrine.

Respectfully submitted,



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